

The Hon. Ronald Castleberry  
1:30 p.m. October 2, 2008

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SKAGIT**

ANNIE JANICKI,

Petitioner,

v.

CITY OF SEDRO-WOOLLEY, a municipal corporation; DELUXE RECYCLING AND DISPOSAL LLC, a Washington limited liability company; and FIRE RIDGE LLC, an Oregon limited liability company,

Respondents,

v.

SKAGIT COUNTY, a political subdivision of the State of Washington,

Intervenor.

No. 08-2-01130-8

**SKAGIT COUNTY'S BRIEF  
REGARDING PROPOSED ORDER  
GRANTING SKAGIT COUNTY'S  
MOTION TO VACATE HEARING  
EXAMINER'S DECISION AND  
REMAND FOR FURTHER  
PROCEEDINGS**

On September 9, 2008, the Court ruled that the Deluxe SEPA process should be remanded to the City. The Court asked the parties to present proposed orders on October 2, 2008, with briefing as to any issues on which the parties are not in agreement. The County's proposed form of order accompanies this brief. The County took careful notes of the Court's oral ruling, and has attempted to hew as carefully as possible to the Court's oral ruling. The County has also included language in the order

1 per the City's request in its September 29, 2008 brief that it be allowed opportunity to  
2 utilize an outside consultant.

3 There are two unresolved issues related to the order that are analyzed in this  
4 brief:

- 5 • Whether (a) the City must conduct a new SEPA threshold analysis  
6 considering the Jacobs information [as County/Petitioner urge]; or, in the  
7 alternative, (b) City staff should simply re-read the Jacobs letter and  
8 decide whether to change their minds [as Deluxe urges].
- 9 • The scope of information that Solid Waste Division Manager Leo Jacobs  
10 may contribute during a new SEPA process.

11 The County addresses each in order.

12 1. Effect of Remand. Petitioner Janicki and the County believe that a new  
13 SEPA threshold determination is indispensable for the Court's remand to have meaning.  
14 For its part, Deluxe argues (with no supporting authority) that the City should simply re-  
15 read the Jacobs letter, and, if the Jacobs letter changes City Planning staff's SEPA mind  
16 about the original determination of non-significance, then and only then should the City  
17 be required to conduct any additional analysis or issue a new SEPA threshold  
18 determination. The City takes no position on this matter, and says (via its September  
19 29, 2008 brief) that it would be satisfied with either approach.

20 Deluxe's proposed approach is clearly unsatisfactory. During the prior  
21 proceedings, City planners testified that they already considered Mr. Jacobs' comments.  
22 Having done so (obviously), they issued a determination of non-significance. Ordering  
23 City planners to simply re-read Jacobs' letter and determine whether to reverse  
24 themselves *sua sponte* clearly fails to comport with the Court's basic ruling, i.e., that the  
25 City should conduct a meaningful SEPA process, taking into consideration what Mr.  
26 Jacobs had to say in some fashion evidenced in the record.

1           Moreover, Deluxe's proposed approach runs directly counter to SEPA's basic  
2 intent, which is to consider input as part of a decision-making process rather than an  
3 after-the-fact exercise in justifying a decision already made. See, WAC 197-11-406  
4 (SEPA review is "not be used to rationalize or justify decisions already made.") See  
5 also, *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9<sup>th</sup> Cir. 2000)(Environmental review "must  
6 be taken objectively and in good faith, not as an exercise in form over substance, and  
7 not as a subterfuge designed to rationalize a decision already made.")

8           For the remand to have any meaning, it must involve a new SEPA threshold  
9 determination. The City must consider the information in the Jacobs letter – including  
10 but not limited to a discussion of the applicable solid waste management plan – in the  
11 process of conducting its SEPA analysis and issuing a threshold determination.  
12 Thereafter, citizens and agencies must have an opportunity to appeal that determination  
13 on the basis of the analysis performed (or not performed, as the case may be). If it were  
14 otherwise, the City would have no downside for simply rubberstamping its own prior  
15 decision. In other words, Deluxe's proposed approach would do little more than afford  
16 City planners a *pro forma* opportunity to agree with themselves. Without a new  
17 threshold determination and appeal opportunity, it seems like a verity that City staff will,  
18 in fact, agree with themselves.

19           Deluxe proposed approach is not acceptable. The Petitioner / County proposed  
20 approach – which the City of Sedro-Woolley finds acceptable – is set forth in the  
21 County's proposed order.

22           2. Mr. Jacobs' Alleged "Conflict Of Interest" And The Scope Of Mr. Jacobs'  
23 Statements. The issue of Mr. Jacobs' "apparent" conflict of interest was already raised  
24 during the prior proceedings.<sup>1</sup> By revisiting these sinister-sounding but ultimately  
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27 <sup>1</sup> The City's brief carefully dances around saying that Mr. Jacobs has an actual conflict of interest, calling it an  
"apparent" conflict of interest throughout on the basis of its not-quite-demonstrative evidence. If the City can't

1 irrelevant facts,<sup>2</sup> the City hopes this Court will muzzle Mr. Jacobs, i.e., strictly limit  
2 Jacobs' comments to those already written.<sup>3</sup> The City continues to demonstrate its  
3 fundamental misunderstanding of the SEPA process and its open approach to facts and  
4 information. Mr. Jacobs should be allowed to say whatever it is he has to say, and the  
5 City's strident effort to muzzle Mr. Jacobs only raises more concerns about what else it is  
6 the City doesn't want Jacobs to say. What is the City afraid of? The City's request  
7 should be rejected, and the Petitioner / County proposed order reflects as much.

8 As an initial matter, the City fails to appreciate that this issue is not about  
9 personalities and egos. The issue is at hand is that someone highly informed about solid  
10 waste matters (i.e., Jacobs) said things about the Deluxe proposal during the SEPA  
11 comment period that were (a) inconvenient to approval of the Deluxe proposal; and (b)  
12 were later raised by both the County and Petitioner Janicki on an independent basis.  
13 Those comments were removed from the SEPA record by someone who is not Mr.  
14 Jacobs, something the City admitted during the prior proceedings. As the County  
15 discussed in its briefing below:

16 [T]his is not actually about Mr. Jacobs. Rather, this is about  
17 the undisputed fact that commentary by the City's resident  
18 expert going to the core issues in this litigation was stamped  
19 into the SEPA record and then disappeared without a trace  
20 until it was brought forward by Mr. Jacobs one week ago.

21 Skagit County's Motion to Clarify Record etc., dated September 3, 2008, at 12:10-13.  
22 As a result, among other things, the facts could not be developed by the Petitioner during  
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24 bring itself to say that Jacobs has an actual conflict of interest, it seems unreasonable to insist this Court should  
25 fashion an order tailored around that concept.

26 <sup>2</sup> It is worth recalling that Mr. Jacobs relayed informed under the protection of the Local Government  
27 Whistleblower Act. The City's apparent campaign to disparage Mr. Jacobs comes dangerously close to violation  
28 of that law.

<sup>3</sup> Since the City argued in the prior proceedings that City Supervisor Berg's "tutorial" of Jacobs was a mere  
chummy session aimed at correcting Mr. Jacobs' grammar, the City's current effort to freeze Mr. Jacob's letter in  
amber for the purpose of a new SEPA analysis seems rather disingenuous.

1 the Hearing Examiner proceedings through discovery and cross-examination. The  
2 entire SEPA process was therefore adulterated.

3 While this order presentation is obviously not an appropriate venue for fact-  
4 finding, the City's so-called "evidence" about Mr. Jacobs is highly suspect, and bears  
5 brief rebuttal to the extent possible. In the County's understanding as the regulator of  
6 solid waste countywide, Tri-County Recycling (which handles small volume source-  
7 separated recycling) is not in the same line of business as Deluxe's proposal (which  
8 aims to handle municipal solid waste).<sup>4</sup> In the County's understanding, Mr. Jacobs has a  
9 small consulting contract with Tri-County Recycling to the tune of several hundred dollars  
10 a year. The declaration of Mr. Hayden (see ¶ 8) reflects that the City waived any  
11 conflict of interest arising from Mr. Jacobs' consulting work after an investigation, and  
12 nothing in any of the "evidence" submitted by the City reflects that has been revoked or  
13 changed. Mr. Hayden's after-the-fact opining about the proper theoretical role for Mr.  
14 Jacobs' comments with respect to the Deluxe proposal under Sedro-Woolley's alleged  
15 policies when Hayden was City Attorney is simply more post-hoc rationalization. See,  
16 *Sacks v. Office of Foreign Asset Control*, 466 F.3d 764, 780 (9<sup>th</sup> Cir. 2006)(Courts owe  
17 no deference to "post hoc rationalization advanced...to defend past agency action  
18 against attack.") Finally, it is worth considering that Mr. Hayden, in the County's  
19 understanding, presently has a contract with the City of Sedro-Woolley to perform  
20 collection-related legal services, and, in addition, is representing the Sedro-Woolley  
21 Mayor in opposition to a recall petition filed by Sedro-Woolley citizens related to the  
22 Mayor's alleged mishandling of the Deluxe proposal. See, **Exhibit A**. Since Mr.  
23 Hayden is presently being paid by the City to represent the City as well as the Mayor's  
24 personal interests specifically related to the Deluxe proposal, Mr. Hayden is obviously

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27 <sup>4</sup> If the City understands the difference, the City is misrepresenting the facts to the Court. If the City fails to  
comprehend the difference, the City is dangerously ignorant about the solid waste industry it hopes to enter.

1 something short of the objective fountain of information he presents to this Court. The  
2 City's convenient omission of all these inconvenient facts borders on misrepresentation  
3 to this Court, and demonstrates little besides the City's unacceptable approach to  
4 inconvenient information – which is, after all, the underlying point of this motion.

5 Of course, the only way to deal with all of this factual murk is through discovery.

6 As the County briefed the Court in the proceedings below:

7 [I]f Mr. Jacobs is to be deposed as the City and Deluxe will no  
8 doubt insist, then it is only fair that those who seek to impeach  
9 Mr. Jacobs should be deposed. Deluxe's principals must also  
10 be deposed to learn whether they had any knowledge of the  
11 issues with the SEPA record. Discovery is also proper as the  
12 City's involvement with and accommodation of Deluxe.

13 ...  
14 Fortunately, all of this strain on the Court's resources is  
15 unnecessary. In the County's view, a far better approach to this  
16 quandary is to simply vacate the Hearing Examiner's decision,  
17 and place the entire process back into the context of the open  
18 record that a new SEPA process would afford.

19 Skagit County's Motion to Clarify Record, Etc., dated September 3, 2008 at 9:13-17;  
20 10:3-6. Petitioner Janicki took the same position. Deluxe and the City argued  
21 vehemently that no discovery should be allowed, despite their own liberal salting of the  
22 record with new and extrinsic information. The Court agreed with all parties in this  
23 respect, ruling in favor of remand instead. Accordingly, the Court should pay no mind to  
24 the evidence presented by the City in an effort to disparage Mr. Jacobs, since it is simply  
25 rehashing something this Court already decided.

26 In reality, all of this speaks to the need for a new SEPA threshold determination,  
27 as discussed in the preceding section: The City will perform its analysis considering  
28 whatever Leo Jacobs has to say, and, if the City fails to consider that information on  
objective basis in making its decision (it is not entirely unreasonable to suggest that  
might occur, given the events thus far), then there needs to be some opportunity to  
challenge that decision; otherwise the Court's remand is effectively meaningless. If the  
basis for such a challenge is Mr. Jacobs' input, then the City can defend against such an

1 appeal by attempting to impeach Mr. Jacobs. The appealing party can introduce  
2 rebutting evidence, or, if necessary, request discovery and cross-examination (as is  
3 permitted). As the Court correctly concluded, the present LUPA proceeding is simply  
4 not the place for this to occur.

5 The City's request that this Court muzzle Mr. Jacobs on the basis of spurious and  
6 unreliable evidence that the County has no opportunity to explore through discovery (in  
7 effect, unfalsifiable propositions) is neither proper nor consistent with the open  
8 consideration of facts that SEPA is meant to foster. Instead, the Court should foster an  
9 environment where all the facts come out. This means (a) letting Mr. Jacobs say  
10 whatever he wants to say; and (b) ordering a new SEPA threshold determination.

11 Mr. C. Thomas Moser, counsel for Petitioner Janicki, recently experienced a  
12 death in the family and is attending a funeral today out of town. Today's date is the  
13 deadline for submissions regarding this matter. Mr. Moser requested that the  
14 undersigned inform the Court that Petitioner Janicki supports the County's proposed  
15 Order and positions in this brief.

16 DATED this 8<sup>th</sup> day of September, 2008.

17 SKAGIT COUNTY PROSECUTING ATTORNEY

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19  
20 By

  
\_\_\_\_\_  
William Honea, WSBA No. 33528  
Attorneys for Skagit County

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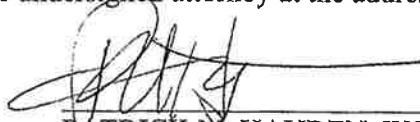
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SKAGIT

IN RE THE PETITION FOR RECALL OF  
MIKE ANDERSON,  
Mayor of the City Sedro-Woolley.

CAUSE NO. 08-2-01693-8  
NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney hereby enters his appearance on behalf of Mike Anderson, and requests that copies of all further pleadings and papers herein, except original process, be served on the undersigned attorney at the address set forth below.



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Attorney for Mayor Anderson

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NOTICE OF APPEARANCE, PAGE 1

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EXHIBIT

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*9/16/08*